of America, C.I.O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer Walter Lassiter, Calvin L. Singleton, H. D. Lassiter, Grady Carroll, Melvin Purvis, R. B. Granger, J. D. Story, A. C. Letchworth, T. C. Singleton and J. R. Smith, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make all of said employees and N. H. Wells and W. W. Singleton whole for any loss of pay suffered, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," and hereinabove.

(b) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of their employees in the aforesaid appropriate unit with respect to rates of pay, wages, and hours and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(c) Post at their Auburndale, Florida, plant copies of the notice attached hereto as an "Appendix."[3] Copies of said notice, to be furnished by the Regional Director of the Tenth Region, shall, after being duly signed by the Respondents, be posted by them immediately upon receipt thereof and be maintained by them for a period of sixty

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[3] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

(60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all pay-roll records, social security payment records, timecards, personnel records, and all reports and other records necessary to determine the amount of back pay due;

(e) Notify the Regional Director for the Tenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent discriminatorily discharged David Lassiter.

Signed at Washington, D. C. Oct 29 1953

Guy Farmer, Chairman
Abe Murdock, Member
Ivar H. Peterson, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL BARGAIN collectively upon request with UNITED STEELWORKERS, CIO, as the bargaining representative of the employees in the bargaining unit

described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including truck drivers, at our Auburndale, Florida, plant, excluding office employees, professional employees, guards or watchmen, and supervisors as defined in the Act.

WE WILL NOT discourage membership of our employees in the above-named or any labor organization by discharging or refusing to reinstate any of them, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of their employment.

WE WILL OFFER all employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and we will make all said employees and N. H. Wells and W. W. Singleton whole for any loss of pay suffered as a result of the discrimination against them:

Walter Lassiter	J. E. Story
Calvin L. Singleton	A. C. Letchworth
Grady Carroll	T. C. Singleton
Melvin Purvis	J. B. Smith
R. B. Granger	H. D. Lassiter

WE WILL NOT threaten our employees with the closing or removal of our plant or other reprisals for their engaging in union activities. We will not interrogate our employees as to their union affiliations or activities; we will not solicit our employees to keep under surveillance and report union activities; and we will not promise our employees reward for refraining from union activity.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

MARION G. DENTON AND
VALEDIA W. DENTON
d/b/a MARDEN MANUFACTURING
COMPANY
(Employer)

Dated..... By.....
(Marion G. Denton)

Dated..... By.....
(Valedia W. Denton)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Opinion of the Court Below

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: The Board petitions for enforcement of its order issued against respondents on October 29, 1953, based on findings (1) that respondents have restrained and coerced their employees in the exercise of their right to engage in union activity in violation of Sec-

tion 8(a)(1) of the Act; (2) have discharged certain employees or refused to reinstate them because of their union activity, in violation of Sections 8(a)(3) and (1); and (3) have refused to bargain collectively in good faith with the union, in violation of Sections 8(a)(5) and (1) of the Act. 29 U.S.C.A., Sections 158(a)(1), et seq. The Board's decision and order are reported at 106 N.L.R.B. 247.

Respondent Company is engaged in the manufacture and sale of brush and weed cutting machinery at Auburndale, Florida. In a Board conducted election involving the Company's production and maintenance employees, held on May 5, 1952, the charging union prevailed,[1] and was duly certified on May 13 as the accredited bargaining representative of the employees. There is testimony credited both by the Trial Examiner and the Board that for about one month prior to the election the Company, principally through its supervisor, Brewster, and owner, Marion Denton, sought to hinder the union's organizational campaign by interrogation and intimidation of its pro-union employees. Specifically, Brewster told employee Purvis "that if we went on and tried to get the Union in—it was going to shut every one of our jobs down", and he later promised employees Carroll and Letchworth that if the union "didn't come in * * he would give us all piecework back and we would make more money." About three weeks before the election, Brewster promised a higher paid piecework job to an hourly paid employee, Granger, if he would "pull out of the Union", and urged employee H. D. Lassiter to renounce the union.

In addition to the above recited testimony as to specific threats and promises to employees by Brewster made to forestall the advent of the union in the plant, there is further credited testimony as to respondent Marion Denton's active participation in the pre-election anti-union campaign. When employee H. D. Lassiter openly advocated unionization in his presence, Denton remarked that he had fired Brewster's predecessor, Clark, "on account of the Union",

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[1] The union here involved is United Steel Workers of America, CIO.

and further intimated that the union might adversely affect H. D. Lassiter and his two sons, Walter and David, both of whom were then employed by respondents. Denton's threat was subsequently reiterated by Brewster, who told H. D. Lassiter in effect that if Denton "shut the shop up" because of the union, Lassiter and his sons would all lose their jobs. Three days before the election the employees were assembled in the plant machine shop at Denton's instance, where he told them that he was disregarding his lawyer's advice in stating "he would never sign a contract with any union";[2] that the employees could gain nothing by paying union dues; that employees of a nearby plant had been discharged for union activity, and had failed in their efforts to be reinstated; that neither the union nor the Government could put the employees "back to work or pay * for the time * lost"; that "maybe the scale of hours would be cut if the Union got in"; that they could join the union and he would not discharge any of them for doing so, but "he had run his business his way and the Union or nobody else was not going to tell him how to run his own business."

With reference to the findings as to respondents' discriminatory discharge of employees Walter Lassiter and Calvin Singleton, the credited testimony broadly reveals that both these employees had performed their duties with apparent satisfaction and without reprimand until they became actively affiliated and identified with the union's organizational campaign, after which they fell into disrepute with both Denton and Brewster and were discharged. While admittedly there is testimony tending to support respondents' contention that these two employees were justifiably discharged, on recommendation of Brewster and Keefer, for non-productiveness and lack of work, other testimony and inferences support the finding of both the Trial Ex-

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[2] Denton's disclaimer of any intention of ever reaching an agreement with the union was reiterated to a number of respondents' employees both by Denton and plant manager, Keefer, before and after the union's election victory on May 5th.

aminer and the Board that their discharges were discriminatorily motivated.[3]

The testimony relied upon to support the finding of H. D. Lassiter's discriminatory discharge fairly reveals that, although this employee openly revealed his pro-union sympathy to Denton during the union campaign and was impliedly threatened with discharge therefore, he had already subjected himself to justifiable discharge under other Board findings for excessive absenteeism and drinking on the job during this period.[4] Relying, however, upon an alleged inconsistency between respondent's contention that H. D. Lassiter was discharged "for drinking on the job" and Denton's testimony "that Lassiter was discharged for absenteeism", and on other employee testimony found to support the inference that drinking on the job was "a plant practice which, strange as it may seem, had been tolerated by the Respondents for a number of years", the Board concluded that his admitted absenteeism and drinking "were not the motivating causes for Lassiter's discharge", but that he was actually terminated pursuant to prior threats for his union advocacy.

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[3] For example, although the Company showed that Walter Lassiter had been absent from work for several weeks in 1952 because of a hernia operation, there is other testimony that such absences, occurring prior to Lassister's adherence to the union, were with the Company's consent and approval; that Denton even advanced him money to pay his hospital bills on that occasion and Brewster warned him to "take it easy" upon his return to the shop so as to avoid re-injury. There is further credited testimony rebutting the Company's proof that Singleton was justifiably discharged because his temporary steel stacking job had been completed, it being shown that, prior to his active advocacy of the union, he was a regular employee, like Walter Lassiter, doing satisfactory work without warning or threat of impending discharge.

[4] The Board found that, "Lassiter, as well as practically all the other employees and their foreman had been in the habit of drinking beer during working hours. In May 1952, Lassiter was found to have been drinking on the job, and was warned about such conduct. The record also shows that Lassiter was absent 47 days in 1951, and 28 days in 1952, including 4 days of unexplained absence during the week in which he was discharged."

With reference to the 8(a)(5) refusal to bargain violation, the Board mainly adopted findings by the Trial Examiner that the Company, through its attorney, Surles, and plant manager, Keefer, met with the principal union negotiators, Riffe and Gravatt, on May 27, June 4, and June 25, 1952, and that at these bargaining conferences a number of proposed contractual provisions were discussed, including grievance procedure, union liability, a probationary period for new employees, etc. Though the Company made certain nominal and illusory "concessions" during these conferences with regard to the grant of plant bulletin board space to the union, recognition of the appropriate bargaining unit, overtime pay, and assumption of responsibility for maintaining plant health and safety conditions,[5] it refused to grant any wage increase or make any other financial concessions to the union,[6] and also refused to accede to union demands on other bargaining issues of grievance procedure, union security, dues check-off, and paid vacations and holidays.

The Trial Examiner and Board, apparently acknowledging the rule adhered to by this Court in *American National Insurance Co.* v. *N.L.R.B.*, 187 F. 2d. 307, affirmed 343 U.S. 395, and most recently restated in *N.L.R.B.* v. *National Paper Co.*, slip opinion dated November 16, 1954, holding that the Act does not require an employer to capitulate to union demands on any bargaining issue or to make any particular concession, never-

[5] These so-called "concessions" were characterized as more or less nominal and illusory, principally because practically all of them were independently required either by Federal or Florida state law. See N.L.R.B. v. Inter-City Advertising Co., 4th Cir., 190 F. 2d. 420, 421, cert. denied 342 U.S. 908; Fair Labor Standards Act, 29 U.S.C.A. Sec. 201, et seq., as amended; Title 49 Fla. Stat. Ann. Sec. 440.56(1).

[6] The credited testimony reveals that when union negotiator, Riffe, requested permission to have the Company's books inspected to determine whether it was financially able to grant a wage increase, Atttorney Surles refused, stating "that Denton was able to give an increase but that he was not willing to do so * because of the world situation * with everything so uncertain."

theless held that the Company's failure to yield in any respect was "a material factor" in determining whether it had actually complied with its statutory obligation to bargain in good faith. Considering the Company's attitude throughout the bargaining period against the background of the other violations found, and particularly in the light of prior statements by Denton and his supervisors both before and after the election that he "would never sign a contract with any union", we think substantial evidence supports the Board's finding that the Company had throughout engaged only in "surface negotiations", and that its mere "willingness to talk" was insufficient to comply with the good faith bargaining requirement of Section 8(a)(5).[7] See *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 1st Cir., 205 F. 2d. 131, 134-135; *N.L.R.B.* v. *Athens Mfg. Co.*, 5th Cir., 161 F. 2d. 8.

We think the Board's findings and order as to the 8(a)(1) violations based on the above recited and other testimony of coercive interrogation and intimidation of Company employees for union activity by Denton and his supervisors, Brewster and Keefer, as well as the 8(a)(3) and (1) violations resulting from the discriminatory discharge of Walter Lassiter and Calvin Singleton, are clearly entitled to enforcement as supported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. We think, however, that the Trial Examiner and Board, in finding discriminatory motivation in the discharge of H. D. Lassiter, have inadevertently attached undue emphasis to the testimony as to his conceded pro-union status, while minimizing other substantial evidence of his admitted derelictions

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[7] The undisputed testimony supports the Trial Examiner's further finding, impliedly approved by the Board, of independent violations of Section 8(a)(5), inherent in Denton's adamant refusal to permit the union's own international representatives to participate in any grievance procedure, and its exclusion of H. D. Lassiter from bargaining sessions after his discharge solely on the ground that he was no longer an employee of the Company. See N.L.R.B. v. Deena Artware, Inc., 6th Cir., 198 F. 2d. 645, 651, cert. den. 345 U.S. 906.

and breaches of plant discipline after warning, so that upon this record we cannot reject respondents' emphatic assertion that, as a key plant employee, his "4 days of unexplained absence during the week in which he was discharged", as well as his beer drinking on the job after warning,[8] actually prompted his discharge for justifiable cause under the Act. Certainly, we cannot say, viewing the record as a whole, that the burden of proof that his discharge was discriminatorily motivated has been met, or that the Board's finding of unlawful motivation and its order of reinstatement in H. D. Lassiter's behalf is supported by substantial evidence. We further doubt whether the testimony viewed in its entirety fairly supports any finding or inference that respondents had effectively condoned H. D. Lassiter's absenteeism and on the job drinking with knowledge of any "plant practice" in the latter regard. Assuming, however, that the Trial Examiner and Board correctly held respondents had waived H. D. Lassiter's derelictions in this respect before knowledge of his active union advocacy, respondents, nevertheless, did not forfeit or waive their right under the Act to discharge him for such undesirable practices in the future, nor were they required to continue excusing his absenteeism and drinking in order to avoid violation of Section 8(a)(3) of the Act. This Court has consistently recognized that neither passive union membership nor active union leadership, as such, is a guarantee against discharge for justifiable cause under the Act. *N.L.R.B.* v. *Fulton Bag & Cotton Mills*, 5th Cir., 175 F. 2d. 675, 677; *N.L.R.B.* v. *Williamson-Dickie Mfg. Co.*, 5th Cir., 130 F. 2d. 260, 265; see also *N.L.R.B.* v. *Century Cement Mfg. Co.*, 2nd. Cir., 208 F. 2d. 84, 86. We conclude, therefore, that the Board's order of reinstatement

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[8] We reject the Board's finding that "while (H. D.) Lassiter was warned against drinking on the job shortly before his discharge there is no evidence that he was thereafter guilty of such misconduct", as incorrect in view of Lassiter's own testimony that he drank beer on the job "from the day I went there until the day I was discharged."

and its back pay award to H. D. Lassiter is unjustified and may not be enforced.

Finally, we agree with the Trial Examiner and the Board that the strike of July 1, 1952 was an unfair labor practice strike resulting mainly from respondents' refusal to bargain in good faith[9] and its discriminatory discharge of Walter Lassiter and Calvin Singleton, rather than an economic strike resulting from Denton's refusal to grant a wage increase or make any other particular concession not required under Section 8(d) of the Act. See 28 U.S.C.A. Sec. 158(d); *Majure* v. *N.L.R.B.*, 5th Cir., 198 F. 2d. 735, 739; *N.L.R.B.* v. *International Typographical Union*, 7th Cir., 193 F. 2d. 782, 804, cert. denied 344 U.S. 816; *N.L.R.B.* v. *Whittier Mills Co.*, 5th Cir., 111 F. 2d. 474, 478, 479. Cf. *N.L.R.B.* v. *National Paper Co., supra; N.L.R.B.* v. *Barrett Co.*, 7th Cir., 135 F. 2d. 959, 961-962. It follows that the striking employees were properly held entitled to reinstatement as of July 9, 1952, the date of their unconditional application,[10] and that the Company's refusal to grant them re-employment was in violation of Sections 8(a)(3) and (1) of the Act. *Majure* v. *N.L.R.B., supra.*

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[9] Respondents have filed a motion under Section 10(e) of the Act [29 U.S.C.A. Sec. 160(e)] to remand this case to the Board in order that it may adduce additional evidence to show that the union itself rendered the requirement of good faith bargaining impossible of compliance, but we think the Board correctly argues that respondent's motion must be denied. See e.g., N.L.R.B. v. Pool Mfg. Co., 339 U.S. 577, 579, 581-582; N.L.R.B. v. Mexia Textile Mills, Inc., 339 U.S. 563, 567.

[10] Like the Trial Examiner and the Board, we reject Denton's contention that he understood the "committee" of three employees (W. W. Singleton, T. E. Singleton and John H. Smith) who requested unconditional restatement on July 9 were speaking only for themselves, rather than for all the striking employees, as they testified Denton was informed. Since this was a conflicting factual issue which appears to have been properly resolved by the Board upon substantial evidence, we decline to disturb the Board's finding in favor of reinstatement for all striking employees here. See N.L.R.B. v. Pittsburgh Steamship Co., 337 U.S. 656, 659-660; Olin Industries, Inc. v. N.L.R.B., 5th Cir, 192 F. 2d. 799.

Section 2(a) of the Board's order will be modified so as to exclude the reinstatement and back pay award to H. D. Lassiter, and as thus modified, the order is hereby

ENFORCED.

A True Copy:
Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.

Judgment

Extract from the Minutes of December 9, 1954

No. 14938

NATIONAL LABOR RELATIONS BOARD,

versus

MARION G. DENTON AND VALEDIA W. DENTON
d/b/a MARDEN MANUFACTURING COMPANY

This cause came on to be heard on the petition of the National Labor Relations Board for the enforcement of an order of the National Labor Relations Board, made on October 29, 1954, "In the Matter of Marion G. Denton and Valedia W. Denton d/b/a Marden Manufacturing Company, Employer, and United Steelworkers of America, CIO, Petitioner" and "In the Matter of Marion G. Denton and Valedia W. Denton d/b/a Marden Manufacturing Company, Employer, and United Steelworkers of America, CIO, Petitioner", Case Nos. 10-RC-1807 and 10-CA-1523 respectively, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the said National Labor Relations Board in this cause be, and the same is hereby, modified so as to exclude the reinstatement and back pay award to H. D. Lassiter, and as thus modified, that said order be, and it is hereby ordered enforced.

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CITATIONS

Cases:

Majure v. *National Labor Relations Board*, 198 F. 2d 735 — 16

National Labor Relations Board v. *American National Ins. Co.*, 343 U. S. 395 — 14

National Labor Relations Board v. *Pittsburgh S. S. Co.*, 340 U. S. 498 — 14

National Labor Relations Board v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, certiorari denied, 346 U. S. 887 — 14, 16

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) — 2

Section 8 (a) (1) — 3

Section 8 (a) (3) — 3

Section 8 (a) (5) — 3

335475—55——1

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 603

MARION G. DENTON AND VALEDIA W. DENTON, d/b/a MARDEN MANUFACTURING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet., App. B, pp. 13–21) is reported at 217 F. 2d 567. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 80–131) [1] are reported at 106 N. L. R. B. 1335.

[1] The symbol "R" refers to the Transcript of Record printed as Volume I pursuant to the rules of the court below; the symbol "B. A." refers to the appendix to the brief filed by the Board in the court below.

JURISDICTION

The decree of the court below (Pet., App. B, p. 22) was entered on December 9, 1954. The petition for a writ of certiorari was filed on February 17, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the National Labor Relations Board's finding that petitioners refused to bargain in good faith with the certified representatives of their employees, and thereby violated Section 8 (a) (5) of the National Labor Relations Act, as amended.[2]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in Appendix A to the petition, pp. 1–2.

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[2] In their statement of the questions presented, petitioners present the additional question of whether the court below properly found substantial evidence on the record as a whole to support the Board's findings that petitioners had, in violation of the Act, discriminatorily discharged employees Walter Lassiter and Calvin Singleton. Since petitioners do not advert further to this contention in their supporting brief, it suffices to say that the decision below is, for the reasons set forth therein (Pet., App. B, pp. 15–16, 20), correct and manifestly presents no issue warranting issuance of the writ.

STATEMENT

I. THE BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A. THE UNFAIR LABOR PRACTICES

The Board found that, in violation of Sections 8 (a) (1), (3) and (5) of the Act, petitioners (hereinafter collectively referred to as the Company) had interfered with, restrained and coerced employees in the exercise of rights guaranteed by the Act; discriminatorily discharged or refused to reinstate a number of employees because of their union activities; and refused to bargain collectively in good faith with the certified representative of their employees, the United Steel Workers of America, CIO (hereinafter referred to as the Union). The subsidiary facts on which these findings are based, insofar as they are here relevant, may be summarized as follows:

In the early part of 1952, the Union initiated an organizational campaign among the Company's employees, enlisting the active support of employees H. D. Lassiter, his two sons, Walter and David, and Calvin Singleton (R. 84, 98, 105, 107, 110; B. A. 37, 40, 42, 82, 84), all of whom were subsequently discharged (*infra,* pp. 6–7). On May 13, 1952, the Board, after an election which the Union won, certified it as the bargain-

ing representative for the Company's employees in an appropriate unit (R. 98; 16–17, 21–22).

Both before and after the election, the Company engaged in an intensive campaign of threats, promises of benefit, and interrogation of employees concerning their union activity in order to discourage the employees from supporting or joining the Union. Thus, Foreman Brewster told one employee that "if we went on and tried to get the Union in * * * it was going to shut every one of our jobs down" (R. 102; B. A. 99); he promised three employees lucrative piecework assignments if they would "pull out of the Union" or if the Union "didn't come in" (R. 101; B. A. 73, 76); and he induced two employees to attend Union meetings and to report to him on the identity of those present at these meetings and what occurred there (R. 101; B. A. 76–78, 80–81, 158–160). Similarly, about 3 weeks before the election, when H. D. Lassiter declared his support for the Union, petitioner Marion Denton remarked that he had fired Foreman Brewster's predecessor "on account of the Union, not reporting to me about the Union," adding that the Union could "affect" Lassiter and his two sons (R. 100; B. A. 84, 92). Foreman Brewster warned Lassiter that "We will all lose our jobs if the Union comes in" because Denton would "shut the shop up" (R. 101, 102; B. A. 83).

Just 3 days before the election, on May 2, Denton addressed at length a group of about 20 of the

Company's employees who were assembled in the plant shop at his instructions (R. 81, 98, 99; B. A. 38–39, 40–41, 43, 46, 151). Denton informed them that he would "never sign a contract with any union whatsoever * * * that his lawyer wouldn't, Mrs. Denton wouldn't, nor Mr. Keefer [his manager], * * * or anybody with any authority" (R. 99; B. A. 39, 43, 49, 58, 63, 65, 89, 141). He adverted to the fact that the employees of a nearby fruit packing establishment had been discharged for attending a union meeting, and had been unable to obtain reinstatement (R. 99; B. A. 39, 44, 49, 59, 63, 66), and asserted that neither the Union nor the Government could "put [the employees] back to work or pay [them] for the time [they] lost" (R. 99; B. A. 39, 44, 49, 59, 63, 66). Denton concluded by assuring the employees that they could join the Union without risk of discharge, but declared that "maybe the scale of hours would be cut if the Union got in there" and that "he had run his business his way and the Union or nobody else was not going to tell him how to run his own business" (R. 99; B. A. 55, 66, 101, 140). Following this speech, Denton told one employee that he would not sign a contract with the Union and threatened to "move his shop to Puerto Rico" before agreeing with the Union (R. 100; B. A. 96). Plant Manager Keefer reiterated Denton's determination never to sign a contract with the Union, warning that

the employees then "would have to strike and lose [their] jobs" (R. 102; B. A. 58).

The Company persisted in its anti-Union campaign after the election. Carrying out its threats of reprisals against employees who became active in the Union, the Company on May 9 discharged Walter Lassiter, an active Union member, and Calvin Singleton, another active member who had performed poll watching duties for the Union at the election (R. 105–109; B. A. 37, 40, 42, 44–46). Foreman Brewster warned again that Denton would "close the doors before he would let the Union come in" (R. 101; B. A. 77), and Plant Manager Keefer, when asked after the election whether Denton would still refuse to sign a contract with the Union, told the employees that he "knew Mr. Denton, and knew when he made a statement he usually backed up his word and he had told them all just what he would do" (B. A. 147).

Following its certification on May 13 as the exclusive representative of the Company's production and maintenance employees, the Union promptly requested the Company to meet with it for the purpose of negotiating a collective bargaining agreement (R. 81, 98; 16, 17, 21, B. A. 13, 34). On three occasions, May 27, June 4, and June 25, meetings were held between representatives of the Company, Attorney A. R. Surles and Plant Manager Keefer, who had authority to negotiate with the Union on all subjects except

wages, and representatives of the Union, International Representatives E. V. Riffe and W. B. Gravatt, and Representative W. V. VanOver (R. 114, 115; B. A. 19, 22). Denton himself refused to meet with the Union representatives at any time (R. 117; B. A. 13, 20, 24–25). Although H. D. Lassiter had been designated by the employees to assist at the negotiations, Surles refused to admit him on the ground that he had been discharged on May 23 and had thereby lost his status as an employee (R. 116; B. A. 21, 22, 87, 92).[3]

At the first meeting, on May 28, which was brief and inconclusive, Union International Representative Riffe read the Union's proposed contract terms, but Surles repeatedly stated that he could not agree to these terms without consulting Denton (R. 114; B. A. 19–20). In answer to Riffe's request for the reinstatement of the Lassiters and Calvin Singleton (see *supra,* p. 6), Surles declared that the Company had no intention to grant this request, and that it would take a Board order to obtain their reinstatement (R. 86; B. A. 20–21).

The two subsequent meetings in June produced agreement on virtually none of the Union's pro-

[3] The Board found that H. D. Lassiter, like his son Walter (*supra,* p. 6), had been discriminatorily discharged because of his union activity (R. 83–86). The court below, however, disagreed with this finding (Pet. App. B, pp. 15–16, 18–20).

posals. The Company did consent to recognize the Union as the exclusive bargaining representative of the employees in the unit determined in the Board's Decision and Direction of Election (R. 114; B. A. 23, 26–27, 107, 123). It also agreed to a basic 40-hour work week, with time and one-half overtime for hourly paid employees, but rejected this arrangement for piece-work employees (R. 115; B. A. 107–108, 123–124). Finally, the Company agreed to be responsible for the safety and health of the employees while they worked; to post a seniority list, although it did not agree as to how the list should be compiled, insisting on separate provisions for piece-work and hourly paid employees; to give limited time off for Union meetings; and to give the Union bulletin board space within the plant, if the Company could censor the material to be posted (R. 114–115; B. A. 25, 107, 108, 123–125).

On various other matters, notwithstanding the efforts of the Union negotiators to compromise their differences, no agreement was reached. Thus, the Union offered to accept a 30-day probation period, during which new employees could be discharged without recourse to the grievance procedure, but the Company demanded 90 days to 6 months, asserting that such a long period was necessary for training purposes (R. 115; B. A. 28, 29, 109). One of the Union negotiators indicated that a 90-day *training* period might be acceptable. Thereafter, Surles insisted that the

Union had agreed to a 90-day *probation* period. The parties, in any event, were unable to agree on any probation clause (R. 115, 116; B. A. 28, 29, 114, 126, 131–132). Similarly, when the Company refused to sign a contract containing a union-shop clause on the ground that the laws of the State of Florida prohibited such agreements, the Union negotiators offered to waive this clause and asked what kind of union-security agreement the Company would be willing to grant (R. 115; B. A. 23, 127). Attorney Surles replied merely that he would have to discuss the matter with Denton (R. 115; B. A. 23, 127).

The Company's negotiators rejected outright all of the other proposals made by the Union. Thus, in accordance with Denton's admitted instructions to the Company negotiators not to consider the granting of any wage increase, Surles rejected the Union's wage demands, stating that Denton had declared that he would not grant "any increase whatsoever" to the employees (R. 116–117; B. A. 23–24, 153). Surles also rejected the Union's offer to have the Company's books inspected by a certified public accountant so that, if it were ascertained that the Company was unable to grant any increase, the Union negotiators could explain this to the employees (R. 116–117; B. A. 24). Surles declared, as he had repeatedly stated throughout the negotiations, that the Company was not going to grant an increase "because of the world situation" (R.

116–117; B. A. 24, 27–28, 131). In similar manner, the Company negotiators refused to consider a clause exonerating the Union from liability for acts of individuals, insisting that the Union be fully liable for such acts and undertake a no-strike obligation (R. 115; B. A. 26, 125). Regarding the Union's proposed grievance procedure, Attorney Surles declared that under no circumstances would Denton meet with any international representative of the Union, and that, accordingly, the Company could not accept a grievance procedure in which such Union officials would participate (R. 115, 117; B. A. 24–25; 108, 124–125). The Company also rejected the Union's proposal for a check-off of union dues (R. 115; B. A. 23, 27, 108) and refused to consider paid holidays or vacations (R. 115; B. A. 26, 108).[4]

Thereafter, at the Union meeting on June 30, Union Representative Riffe reported on the progress of the negotiations, after which the employees voted unanimously to go on strike (R. 86, 118, 119; B. A. 30, 31, 62, 63, 66, 81, 97, 99). Riffe telephoned Surles that evening, informed

[4] Surles asserted at the hearing that the Company had agreed to give paid holidays, and that the Company's acceptance of the Union's vacation proposals was conditioned upon agreement as to the other provisions of the contract (B. A. 124). The Company did not except, however, to the Trial Examiner's finding that it had refused to make any concessions to the Union as to financial benefits requested in the contract (R. 118).

him of the strike vote, and requested one more meeting the following day. Surles refused, declaring "Well you have heard our proposal, more or less, you can take it or leave it" and that he would meet with Riffe only when he was "damn good and ready." On July 1, the employees confirmed their earlier strike vote and established a picket line at the Company premises (R. 119; B. A. 31–32). The Company issued separation notices to the strikers. On July 8 the strikers voted to return to work without a contract and selected a committee to speak to Denton and report their willingness to return (R. 121; B. A. 50–51, 54–55, 59, 64, 67–68, 103). When Denton met with the committee, however, he declared that he "would not even talk to [some of the men] let alone consider ever putting them back to work" (R. 121; B. A. 17–18, 51, 60, 67–68), and added, significantly, "I told you I wasn't going to sign no contract and it still stands" (R. 121; B. A. 60–61, 68).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the entire record the Board found that petitioners, in violation of the Act, had (1) interfered with, restrained and coerced employees in the exercise of rights guaranteed by the Act through threats of reprisals and promises of benefits, (2) discriminatorily discharged employees Walter Lassiter and Calvin L. Singleton because of their union activity, (3) discriminatorily dis-

charged and refused to reinstate the striking employees,[6] and (4) refused to bargain collectively in good faith with the Union (R. 80, 83–87). In finding that the Company had failed to discharge its statutory obligation to bargain collectively, the Board rejected a possible implication in the Trial Examiner's report that the Company's failure to make concessions to the Union with respect to wages or financial benefits was "*per se* a refusal to bargain," rather than only "a material factor," to be taken into account together with the surrounding circumstances "in assessing [the Company's] good faith" in the negotiations (R. 86).

The Board's order directs the Company to cease and desist from the unfair labor practices found, reinstate with back pay the employees discriminated against, and, upon request, bargain collectively with the Union (R. 88–93).

II. THE DECISION OF THE COURT BELOW

The court below enforced the Board's order with one modification not relevant here (Pet.,

[6] The complaint charged that the Company had also violated Section 8 (a) (3) of the Act by discharging David Lassiter on May 9, 1952 (R. 46). David Lassiter appeared as a witness before the Trial Examiner, but because he fainted and was unable to resume his testimony or to be cross-examined during the remainder of the hearing, the Trial Examiner struck his testimony and recommended dismissal of the complaint as to him (R. 104–105; B. A. 5[illegible], 118–119). The Board adopted this recommendation (R. 83). See also note 3, *supra*, p. 7.

App. B, p. 22).[6] Upholding the Board's finding that the Company had refused to bargain with the Union in good faith, and noting, *inter alia*, the Board's statement that the Company's failure to make concessions to the Union with respect to wages or financial benefits was only "a material factor" in assessing the Company's good faith and not "*per se* a refusal to bargain," the court concluded (Pet., App. B, p. 18):

> Considering the Company's attitude throughout the bargaining period against the background of the other violations found, and particularly in the light of prior statements by Denton and his supervisors both before and after the election that he "would never sign a contract with any union," we think substantial evidence supports the Board's finding that the Company had throughout engaged only in "surface negotiations," and that its mere "willingness to talk" was insufficient to comply with the good faith bargaining requirement of Section 8 (a) (5).

ARGUMENT

The decision of the court below, upholding, as supported by substantial evidence on the record as a whole, the Board's finding that petitioners refused to bargain in good faith with the Union, presents no issue warranting review by this Court. The rule that this Court "is not the place

[6] See note 3, *supra*, p. 7.

to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way" (*National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503) has "special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." (*National Labor Relations Board* v. *American National Ins. Co.*, 343 U. S. 395, 409–410).

The Company contends (Pet. 8–11) that the decision below in this respect erroneously took into consideration, *inter alia*, the Company's other contemporaneous unfair labor practices and its refusal to make concessions to the Union on wages or other financial benefits. The decision, it is asserted, is tantamount to a ruling that "an employer with a 'bad' labor background must agree with the union in collective bargaining * * *." The contention is insubstantial.

"The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence" and "from the totality of the employer's conduct." *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134, 139–140 (C. A. 1), certiorari denied, 346 U. S. 887.

Necessarily, the Company's other unfair labor practices in the instant case which immediately preceded, accompanied, and followed the negotiations with the Union—and in the course of which the Company expressed vehement opposition to the Union, engaged in reprisals and threats against the Union's supporters, and repeatedly affirmed that it would never sign a contract with the Union (*supra,* pp. 5, 6, 11)—shed light upon its "state of mind" at the bargaining table. As the court below held (Pet. App. B, pp. 17–18), it was wholly proper for the Board, in order to ascertain that "state of mind," to look not only to the Company's "attitude throughout the bargaining period" but also to its contemporaneous unfair labor practices.

Similarly, the Board legitimately took into consideration, as *some evidence* of the Company's attitude, its failure "to yield ground in any respect * * * with regard to such basic matters, as a wage increase, * * * paid holidays and vacations * * *" (R. 88, 117). Of course, as the Board and the court below pointed out (Pet., App. B, pp. 7, 17–18), the statutory obligation to bargain in good faith does not require either party to the negotiations to make any concessions. The Board in the instant case viewed the Company's failure to make any attempt to meet the Union at least part way with respect to wages or financial benefits as merely one of many factors evidencing the Company's lack of *bona fides* in

the negotiations. As has been pointed out, "if § 8 (a) (5) is to be read as imposing any substantial obligation at all," the Board may properly regard the employer's failure to make "*some* reasonable effort in *some* direction to compose his differences with the Union" as "at least some evidence of bad faith, that is of a desire not to reach an agreement with the union." *Reed & Prince, supra,* at pp. 134–135.

The cases relied on by the Company (Pet. 11), including, notably, decisions of the court below, are not in disagreement with this view. Insofar as any of them absolved the employer from the charge of having failed to bargain in good faith, the different results are attributable, not to a difference in principle, but rather to "the circumstances and the particular facts of the particular case" (*Majure* v. *National Labor Relations Board,* 198 F. 2d 735, 739 (C. A. 5)).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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